



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Katie Hamilton

Applicant

-and-

Crêpe it Up!

Respondent

DECISION

Adjudicator: Mark Hart
Date: October 12, 2012
File Number: 2010-06944-I
Citation: 2012 HRTO 1941
Indexed as: **Hamilton v. Crêpe it Up!**

APPEARANCES

Katie Hamilton, Applicant)
)
) Self-represented

Crêpe it Up!, Respondent)
)
) Gil Fischler, Counsel

INTRODUCTION

[1] This is an Application dated September 22, 2010, and filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”), alleging discrimination with respect to employment because of race, colour and sex.

[2] Crêpe it Up! is a small restaurant business in downtown Toronto owned and operated by Chris Quy Lee as a sole proprietor. The applicant worked at one of the restaurant locations as a cashier / cook from August 25, 2009 to February 21, 2010. The applicant alleges that during her period of employment, she was subjected to racial and sexual comments and conduct by Mr. Lee that created a poisoned work environment and contributed to her decision to quit.

[3] The hearing in this matter was held on May 28 and 29, 2012, in accordance with the Tribunal’s Rules of Practice directing the hearings be conducted in a fair, just and expeditious manner. With the consent of the parties, I took the lead in the initial questioning of all witnesses. For the applicant and Mr. Lee, they were invited to provide any further relevant evidence following my initial questioning and the applicant was invited to provide any further relevant evidence arising from my questioning of Mr. Lee. Cross-examination of the applicant and Mr. Lee was deferred until after the initial questioning of these two witnesses and the evidence of all non-party witnesses had been completed. For non-party witnesses (who were only called by the applicant), my questions were followed by an opportunity for the applicant to ask any further relevant questions and cross-examination by respondent counsel. In addition to the applicant and Mr. Lee, I heard from three non-party witnesses called by the applicant, namely her boyfriend, a former co-worker (“KF”) and the applicant’s mother. Given the issues of credibility that arose in this proceeding, I made an order excluding witnesses. Oral submissions were provided at the hearing after all evidence had been heard.

[4] At the outset of the hearing, I advised the parties that I wanted to keep the hearing focused on allegations of racial and gender discrimination under the *Code*. There were a variety of other work-related issues that the parties had raised in their

materials and I noted that some of this evidence may be relevant to the issues under the *Code* that I needed to determine. However, I noted that work-related issues unconnected to the allegations of discrimination raised in this proceeding were not relevant to the hearing in and of themselves, as I have no general jurisdiction to deal with issues of alleged unfairness or inappropriate treatment that are unconnected or unrelated to alleged violations of the *Code*.

[5] During the course of my questioning of the applicant, respondent counsel raised an objection to evidence provided regarding comments alleged to have been made by Mr. Lee related to the ground of disability, on the basis that this ground of discrimination had not been cited in the Application as one of the grounds of discrimination claimed. The applicant stated that on the Application she should also have indicated that she was claiming discrimination on the ground of disability and/or association with a person identified by a prohibited ground, but acknowledged that she had not done so. I ruled that I would disregard the applicant's evidence in relation to alleged disability-related comments, on the basis that this ground of discrimination had not been claimed in the Application and it was too late for the applicant to seek to amend her Application in the midst of the hearing.

[6] In my view, the applicant's allegations can be divided into six main areas: (1) she alleges that Mr. Lee made discriminatory comments unfavourably comparing her to Japanese employees; (2) she alleges that Mr. Lee made discriminatory comments about African-Canadian employees; (3) she alleges that she experienced gender discrimination in relation to a Valentine's Day promotion at the restaurant; (4) she alleges that Mr. Lee made a sexual comment to her about anal sex; (5) she alleges that Mr. Lee sent a sexualized text message about her to her boyfriend; and (6) she raised allegations about being hugged by Mr. Lee and about Mr. Lee hiring "good looking" employees. I will address the evidence relating to each of these issues in turn.

[7] This case does require the assessment of the credibility of the parties and witnesses who gave evidence before me. In making assessments of credibility, I have

been guided by the well-established principles set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357.

REVIEW OF EVIDENCE

[8] The applicant is a young woman who self-identifies as being a white Canadian of Irish-Scottish descent. She has a step-father whom she identified as Black. Mr. Lee self-identifies as a gay man of Asian descent.

(1) Alleged discriminatory comments re Japanese employees

[9] The applicant states that on December 21, 2009, she was accompanying Mr. Lee to catering event. She states that as they were packing Mr. Lee's vehicle, she realized that she had forgotten a utensil that was required and ran back into the restaurant to get it. She states that when got back, Mr. Lee said that he wished he had an employee named Masumi, who is from Japan, to assist him, as she was more efficient and quicker. The applicant's best recollection is that Mr. Lee said, "I really wish Masumi would have been here, she's quicker, she would never have forgot", and that during the car ride Mr. Lee kept repeating how he wished Masumi was there instead of the applicant. The applicant states that Mr. Lee then went on to talk about her work ethics, and said that because the applicant is Canadian, she is lazy and inefficient and he thought that she was spoiled. The applicant's evidence is that Mr. Lee continued in this vein until they arrived at the catering event, which was a good 15 to 20-minute car ride.

[10] The applicant's evidence is that this was not just a one-time thing, but that Mr. Lee made these kinds of comments about Japanese employees about six or seven times during the course of her employment. She states that Mr. Lee made passing comments about how Japanese employees were quicker, were always on time, and took work more to heart than Canadians, and would go on about how Japanese employees were more efficient. The applicant cannot recall any specific occasions when Mr. Lee made these kinds of comments, other than the December 21, 2009

incident, because these were random passing comments that Mr. Lee would make whenever he felt the applicant was not being efficient enough about doing her job.

[11] The applicant's co-worker, KF, testified that she also heard Mr. Lee make comments about Japanese employees and that he liked to hire them because they were hard-working, eager to learn, and very moldable. This witness testified that she used to assist Mr. Lee with hiring new employees, and she recalls one specific occasion in the summer of 2009 when Mr. Lee said to her that he liked to hire Japanese workers because they were hard-working, always on time, eager to learn, and they listened.

[12] The applicant's boyfriend and mother both recall the applicant telling them about comments made by Mr. Lee to the effect that he preferred Japanese employees, and the applicant's mother specifically recalls being told about the incident relating to the catering event and that Mr. Lee had told the applicant that he wished he was being assisted by a Japanese employee instead of the applicant.

[13] With regard to the December 21, 2009 incident, Mr. Lee states that he never said anything to the applicant about a Japanese worker being better than her. Rather, he states that he pointed out her mistakes and that he was not happy with her. Mr. Lee's evidence is that he had provided the applicant with a list of items to pack and that she failed to pack a crucial item, which was only discovered after they arrived at the event. Mr. Lee denies that he made reference to Masumi on this occasion.

[14] Mr. Lee acknowledges that he did make passing comments to the applicant and KF about Japanese workers, but these comments were based upon his occupation and experience and were not intended to put the applicant down. Mr. Lee states that, based on his experience, he said that he never had problems with Japanese workers coming on time, and that they were eager to learn.

[15] Based upon the evidence before me, there is no dispute that Mr. Lee made positive comments from time to time about Japanese workers being prompt and eager

to learn. The factual dispute is whether Mr. Lee used his positive view of Japanese workers to reflect negatively on the applicant as an employee.

[16] With regard to the December 21, 2009 incident, the comments attributed to Mr. Lee in the Application are that he said the following: “I pretty much suck because I’m not Japanese” and he “criticized the kind of person I am by saying I’m spoiled, a bad worker, and a liar”. I appreciate that the applicant drafted her Application herself and likely was not being as precise in her words as she was when being asked specific questions by me at the hearing.

[17] However, I note two important differences in the applicant’s testimony. First, in her evidence before me, she did not say that Mr. Lee was making a generalized negative comparison between her and “Japanese workers”, but was expressing a wish that a specific employee named Masumi, who is Japanese, was there to assist him instead of the applicant. In my view, this is a material difference. I appreciate that it may be extremely unpleasant for the applicant (or indeed any employee) to be compared by her boss unfavourably to another employee, but that is not the same as deriding the applicant as an employee simply because she is not Japanese.

[18] Second, the applicant’s testimony before me is that Mr. Lee said that she was lazy, inefficient and spoiled “because she is Canadian”. While I do not regard the statement in the Application about Mr. Lee saying that the applicant was “spoiled, a bad worker, and a liar” as being materially different from her evidence before me that he said she was “lazy, inefficient and spoiled”, I do regard it as a material difference that in her testimony before me the applicant states that Mr. Lee expressly said that the applicant possessed these negative attributes “because she is Canadian”. This is not an allegation raised in the Application. Rather, the Application alleges that Mr. Lee said that the applicant possessed these negative attributes because she is “not Japanese”. In my experience, the sting of a racial comment resides in the specific racial language used and witnesses tend not to be imprecise or inconsistent on the racial language, even if they are unclear about the details of the surrounding context. So I see it as problematic that in the Application, the applicant said that the racial language was about

her not being Japanese, whereas in her evidence she stated that the racial language was about her being Canadian. One potential explanation for this discrepancy is that Mr. Lee may have compared her unfavourably to Masumi, who is Japanese, and the applicant perceived that this criticism was being directed at her because she is Canadian and not Japanese without Mr. Lee in fact using these express words.

[19] As a result, I am not prepared to find that Mr. Lee made a racial comment on December 21, 2009 as alleged in the Application. With regard to the generalized allegation about Mr. Lee comparing the applicant unfavourably to Japanese workers on other occasions, I decline to make any finding in this regard due to the lack of specifics or particulars. While I do not disagree with KF's observation that people should be hired on their individual merits rather than on the basis of whether they belong to any particular group, my jurisdiction in this matter is restricted to determining whether the applicant's personal rights were violated and not to any comments Mr. Lee may have made about his hiring preferences which were not made to the applicant and did not affect her personally.

(2) Alleged discriminatory comments about African-Canadian employees

[20] The applicant testified that there were a few occasions when Mr. Lee made comments about Black persons. She recalled one specific occasion when she was having a conversation with Mr. Lee about employees who worked for the respondent before the applicant's time, and Mr. Lee told her that KF had hired a girl who was Black. The applicant states that Mr. Lee made a comment that this employee did not work out because she was often on "Jamaican time" and he did not feel that this was appropriate. The applicant states that she understood Mr. Lee to be using the term "Jamaican time" in a derogatory manner, stereotyping Black people as being late. The applicant states that Mr. Lee also made a comment about this employee being "lazy". The applicant believes that "in a way" Mr. Lee tied it in to her being Black, because he would generalize about Black people being on Jamaican time and being lazy.

[21] The applicant states that Mr. Lee also told her about another Black employee

who was a great worker, but he did not like her because she was on “Jamaican time” and always late for her shifts. The applicant believes that this was probably in the same conversation as when Mr. Lee had mentioned the employee hired by KF, and that this conversation occurred at the beginning of her employment in Mr. Lee’s vehicle on the way to or back from a catering event or festival. The applicant states that Mr. Lee did not mention the names of these employees, and she was not aware of their names.

[22] The applicant states that she does not remember any other specific comments made by Mr. Lee about Black persons, but states that these comments continued on an ongoing basis.

[23] The applicant states that she confronted Mr. Lee about his racial comments in January 2010. She states that Mr. Lee came into the restaurant one evening when she was working with KF, and confronted them both and asked what kind of boss they thought he was. The applicant states that both she and KF said their piece. The applicant states that she raised the issue of Mr. Lee making racial remarks, and identified the kinds of remarks she was talking about. She states that she went through the catering event on December 21, 2009, and also told him how upset she was about his comments regarding “Jamaican time” and other comments about Black people. She states that she told Mr. Lee that she took personal offence because her step-father is Black. The applicant states that in response, Mr. Lee said, “I’m not racist, I hate everyone equally”, and then laughed about it.

[24] The applicant was unable to recall other specific occasions when Mr. Lee made comments about Black people, and further states that she is not aware of any racial comments made by Mr. Lee after the discussion in January 2010. However, she states that Mr. Lee never expressed regret over having made these comments.

[25] KF recalls an occasion in the fall of 2009 after she had hired a Black employee for training. KF states that this employee was late a couple of times and things were not going very well. KF states that this was a personal issue with this employee. She states that Mr. Lee said that he did not hire Black people because they all ran on “Black

people time”. KF was firm in her evidence that “Black people time” was the specific term used by Mr. Lee, and that she did not ever hear Mr. Lee use the term “Jamaican time”. KF was unable to recall the name of this Black employee.

[26] KF also testified about the occasion in January 2010 when Mr. Lee came into the restaurant and asked her and the applicant what they thought of him as a boss. KF states that she raised the subject of Mr. Lee’s racial remarks in the context of talking about racism in general in workplace, and expressed her view that certain comments should not be made in front of employees, such as saying that you do not like to hire Black people because they run on “Black people time”. KF states that on this occasion she also raised her concerns regarding Mr. Lee’s comments about Japanese people, and that just blindly hiring Japanese people because Mr. Lee thought that they were better workers was not right because he was basing his hiring decisions on race and not on actual working conditions. KF recalls the applicant also raising concerns of this nature with Mr. Lee and states that they both were basically voicing the same concerns. KF recalls the applicant saying that she regularly felt compared to Japanese workers. KF testified that Mr. Lee’s response to this discussion was very casual and in joking terms, such that she felt that the concerns were not being taken seriously. She recalls Mr. Lee saying words to the effect that it was “not a big deal” and “you know how I am”.

[27] Mr. Lee acknowledges using the expression “being on Jamaican time”. He states that this was an expression he learned from an African-Canadian man who did some marketing work for the business. Mr. Lee raised with this man a concern about him always being late, and the man responded that he was on “Jamaican time”. Mr. Lee states that he thought this expression was funny, because it reminded him of a Malibu Rum commercial. Mr. Lee denies that he has ever said anything about Black persons being “lazy”.

[28] Mr. Lee recalls a Black employee he had to let go because she was often late. He states that he never had any issues with her except for being late. Mr. Lee recalls an occasion when he was speaking with KF and the applicant, and the situation with this former employee came up. In this context, Mr. Lee acknowledges using the

expression that this employee was let go because she was on “Jamaican time”. Mr. Lee states that on this occasion, the applicant voiced an objection to his use of this expression because her step-father is Black. He states that he told the applicant that he got this expression from a man who had done marketing for the business and that he thought it was funny. Mr. Lee also acknowledges saying to the applicant that he is not a racist because he hates everyone equally. In his evidence, Mr. Lee averred that this may have been wrong of him to say, but to him it meant that he is not a racist.

[29] Mr. Lee denies that this discussion took place in January 2010, as alleged by the applicant and KF. His evidence is that the meeting in January 2010 related specifically to the issue of his practice of keeping tips paid by credit or debit, and the objection of the applicant and KF to this practice. Mr. Lee states that there was no discussion about racial comments at this meeting.

[30] In his evidence, Mr. Lee stated that he did not use the term “Jamaican time” in reference to this employee because she is Black. However, he agreed with me when I suggested to him that he probably would not have referred, for example, to a Mexican worker as being on “Jamaican time”. Nonetheless, Mr. Lee still proceeded to insist that he did not use this term just because this former employee is Black, but because of the Malibu Rum commercial and because “their” culture is more laid back. This is a distinction without a difference. To use the term that a person is on “Jamaican time” in reference to a Black person who is late is a derogatory racial stereotype, which I find Mr. Lee ought reasonably to have known.

[31] I appreciate that at the time he used this expression, Mr. Lee did not know that the applicant’s step-father is Black. However, whether he knew this or not, it is my view that Mr. Lee ought reasonably to have known that the use of the expression about a Black person being on “Jamaican time” was racially discriminatory and could be found unwelcome and offensive to those in whose presence such a comment was made.

[32] Accordingly, I find that at some point early in the applicant’s employment with the respondent business, Mr. Lee made a comment in reference to at least one former

Black employee about her being on “Jamaican time” that he knew or ought reasonably have known to be racially discriminatory. As the applicant’s allegation is that Mr. Lee used the expression “Jamaican time” and as Mr. Lee has acknowledged using this term in the applicant’s presence in the context alleged, I take nothing from KF’s evidence that Mr. Lee used the expression “Black people time” and make no finding in this regard.

[33] I further find that the use of this expression was offensive and upsetting to the applicant, both on a personal level and due to her connection with her step-father. In cross-examination, respondent counsel made much of the applicant’s language in her Application to the effect that Mr. Lee treated his employees “like slaves” and pointed out, quite rightly, that the use of this phrase diminishes the horrific experience of slavery. The applicant acknowledged this in response to these questions, and in fact apologized for her use of this phrase. In my view, however, this does not diminish the fact that Mr. Lee’s use of the expression about being on “Jamaican time” was upsetting and offensive to the applicant.

[34] With regard to the applicant’s allegation that Mr. Lee referred to a former Black employee as being “lazy”, it seems to me from the applicant’s evidence that the racial connection she made regarding this characterization was implied by her in the context of other statements alleged to have been made by Mr. Lee, rather than explicitly stated by Mr. Lee. The applicant was unable to provide particulars of these other alleged racial statements, which in fairness to Mr. Lee deprives me of a proper evidentiary basis upon which to make a finding about these other alleged comments and thereby deprives me of any context within which to assess whether Mr. Lee’s description of this former employee as “lazy”, which Mr. Lee denies, was a racially discriminatory comment. Accordingly, I find that even if Mr. Lee did describe this former employee as “lazy”, I do not have sufficient evidence to support that this was a racially discriminatory comment.

[35] I find that the issue of Mr. Lee’s racial comments was raised with him in January 2010 as stated by the applicant and KF. I do not accept Mr. Lee’s evidence that this objection was raised in August or September 2009, at the time he made the comment

about a former Black employee being on “Jamaican time”, as both the applicant and KF testified that as part of the discussion with Mr. Lee, the applicant raised the matter of her feelings about his comment in relation to the December 21, 2009 event regarding a Japanese worker named Masumi, which obviously occurred well after September 2009. I find that in response to the applicant and KF raising their concerns, Mr. Lee was dismissive and said he was not a racist and hated everyone equally, which he acknowledged saying, and that Mr. Lee did not respond appropriately to the concerns raised.

(3) Allegation re Valentine’s Day promotion

[36] For the week leading up to Valentine’s Day in 2010, Mr. Lee introduced a promotion for his business at his various locations. The idea was that customers would get a 14% discount if they kissed each other (or if the customer was alone, if they kissed themselves, for example, on the hand) and staff would take a picture of the customer’s kiss and post it on a wall under the hearing “love starts here”.

[37] As part of this promotion, Mr. Lee required his staff, who were predominantly female, to wear a button that said, “A kiss gets you 14% off”. The applicant states that she felt uncomfortable about wearing this button and therefore did not wear it. She states that one day Mr. Lee came into the restaurant and saw that she was not wearing the button. She states that she told Mr. Lee that wearing the button made her feel uncomfortable, but he told her that it was mandatory to wear it.

[38] The applicant’s evidence is that two or three times that day, when she was wearing the button, customers tried to reach over the counter and kiss or hug her. The applicant states that, when she spoke to Mr. Lee at the end of the day, he asked about how the promotion had gone and the applicant told him that some customers had tried to hug and kiss her. The applicant states that Mr. Lee responded by saying that she should take this as a compliment. The applicant also states that Mr. Lee did not believe that customers had tried to hug or kiss her. The applicant was upset by this, and states that she said sarcastically, “have a good evening” and hung up the phone.

[39] The applicant states that Mr. Lee came to the restaurant the next morning and confronted her about the situation. There is no dispute between the parties that Mr. Lee did not believe the applicant when she had told him that customers had tried to kiss or hug her, because there was a counter between the customer and staff that was about three feet wide. The applicant's evidence is that Mr. Lee started mocking her about what she said the customers had been doing, and that this brought her to tears. The applicant was firm in her evidence that some customers had tried to lean across the counter and kiss or hug her.

[40] The applicant states that after speaking to Mr. Lee about the situation, she told him that she would wear the button if he let her re-word it. The applicant suggested that the button be re-worded to say, "A kiss to a loved one gets you 14% off". The applicant states that by the time Mr. Lee left the store, he had given his permission for the button to be re-worded, and that evening the applicant and KF re-worded the language on the sandwich board outside the restaurant and on their buttons. This resolved the issue.

[41] KF states that before the promotion, she raised with Mr. Lee a concern that the tagline "A kiss gets you 14% off" seemed to be inviting customers to kiss staff and that she thought that the use of this tagline would invite a response from customers that she found uncomfortable. KF states that Mr. Lee's response was that this was the promotion he was doing and staff were required to participate. In specific response to her concern about customers trying to kiss staff, KF states that Mr. Lee's response was, "Well, let them".

[42] KF states that during the promotion, one customer did try to kiss her. She states that she raised this with Mr. Lee, and told him that what she thought was going to happen was in fact happening. She states that Mr. Lee's response was that the promotion was already in action and that staff were to do it his way, so just do it. KF states that she was part of changing the wording on the buttons. She states that she decided to word it more specifically so that people would understand what the promotion was about and not try to make personal contact. She states that the applicant did the same. KF states that when Mr. Lee saw what they had done with the

wording on the buttons, he was very upset and said that he worded the buttons the way he did for a reason and they should not be going in and changing his vision. KF states that Mr. Lee did ultimately approve the new wording on the buttons and on the sandwich board, after they put up a fight that he knew he was not going to win.

[43] Mr. Lee states that he ran this promotion at all of his locations, and did not have a problem elsewhere. With regard to the location where the applicant worked, Mr. Lee states that he came by one day when the promotion was being run and none of the staff was wearing their buttons. He states that they did not say anything in response to his direction to wear the buttons, and just put the buttons on. Mr. Lee states that when the applicant closed the restaurant that evening, she called him and said that she refused to wear the button. When Mr. Lee asked why, the applicant said that one or two customers had come and hugged her. Mr. Lee states that he did not believe the applicant, because in his view this was impossible since the customer would have to come all the way around the counter into the staff area to hug the applicant. Mr. Lee states that this was a heated conversation because he did not believe the applicant. At the end, Mr. Lee states that the applicant said, “fuck you and goodbye” and hung up the phone. The applicant denies that she said this. Mr. Lee states that he was very upset because he had never been disrespected like that.

[44] Mr. Lee states that when he came in to the restaurant the next morning, he told the applicant that he had never been so disrespected and had never been sworn at by one of his employees, and the applicant cried. Mr. Lee states that they talked and the applicant said that the promotion bothered her and asked him if she could re-word the button, and he approved the changed wording. In Mr. Lee’s view, if the applicant had provided a solution when she had discussed the matter with him the previous evening over the phone, the situation would not have escalated as far as it did. Mr. Lee states that he also spoke that evening with KF, and she said that the promotion made her feel the same way as the applicant. Mr. Lee denies that KF had raised with him any concern about customers misunderstanding the promotion and trying to kiss staff prior to the start of the promotion.

[45] This, in my view, was an ill-conceived promotion. The tagline “A kiss gets you 14% off” is ambiguous (perhaps deliberately so – I will discuss Mr. Lee’s use of double entendre in a subsequent section) and could reasonably be interpreted as meaning a kiss with the staff member across the counter gets the customer the discount. Whether or not KF raised this potential with Mr. Lee prior to the promotion, I find that Mr. Lee reasonably ought to have been aware of this potential interpretation and reasonably ought to have known that such an invitation would make at least some of his female staff members uncomfortable. I accept the applicant’s evidence that it was this discomfort that initially caused her not to wear the button.

[46] There is a dispute in the evidence about whether any customers actually tried to kiss or hug the applicant when she was wearing the button. Mr. Lee does not believe this is possible, because of the three foot wide counter separating the customer from staff, and believes that customers would have had to come all the way around the counter to kiss or hug the applicant. I do not accept this. A three foot wide counter would not be any impediment to a customer trying to lean across to give the applicant or any staff member a kiss or hug. I note that the applicant’s evidence is not that these customers actually kissed or hugged her, but rather that they tried to kiss or hug her. I also do not believe that an actual kiss or hug is required in order for me to find that the applicant was made uncomfortable. In my view, the use of this ambiguous tagline created a situation with the potential for the applicant as a female staff member to be sexualized in the workplace and be made to feel uncomfortable by actual attempts to kiss and hug her and the prospect that these kinds of uncomfortable situations would continue.

[47] The applicant’s evidence that some customers tried to kiss and hug her is supported by KF’s evidence that one customer also tried to kiss her. Mr. Lee held KF in high regard as an employee, and could offer no real reason to explain why KF would lie about this. I appreciate that the applicant and KF are friends and that their friendship has continued after both of them left their employment with the respondent business. However, I do not accept the submission of respondent’s counsel that KF testified as an

advocate for the applicant. I did not find KF's evidence to be embellished or tailored to support the applicant's evidence. For example, KF was adamant in her evidence that Mr. Lee had used the expression "Black people time" as opposed to "Jamaican time". If KF was intent on tailoring her evidence to support the applicant, I would have expected her to have rehearsed the same evidence on the material incidents that the applicant intended to give. But KF did not do that. I also found that KF was prepared to acknowledge when she did not know or could not recall in response to questions, and that she gave her evidence in a straightforward manner. Accordingly, I accept KF's evidence that one customer tried to kiss her during this promotion, and I find that this supports the applicant's evidence that customers also tried to kiss and hug her.

[48] There is no dispute in the evidence that, after being told to wear the button by Mr. Lee, the applicant raised with Mr. Lee that evening that customers had tried to kiss and hug her. There also is no dispute that Mr. Lee did not believe the applicant and thought that she was lying about this. In my view, it is not relevant to my determination of the issues before me whether the applicant sarcastically said "good night and goodbye" before hanging up or whether she said "fuck you and goodbye". The relevant point for this Tribunal under the *Code* is that when the applicant raised with Mr. Lee her concern and discomfort with wearing the button and told him that customers had tried to kiss and hug her, this concern and discomfort was rejected by Mr. Lee because he did not believe her.

[49] The respondent has invited me to conclude that this was a relatively minor issue that was quickly resolved to the applicant's satisfaction after she raised her concern and discomfort. I do not accept this submission. As I already have found, Mr. Lee reasonably ought to have known that the tagline he used on the button could reasonably be interpreted as inviting customers to kiss staff and reasonably ought to have known that this would make staff uncomfortable. Further, when the concern and discomfort was expressly raised with him by the applicant, Mr. Lee's response was to disbelieve the applicant not only on the phone but also when he appeared at the restaurant the following morning. I find that this was understandably upsetting to the

applicant. It was only after he was pressed by the applicant and KF to re-word the language on the button that Mr. Lee ultimately acceded.

[50] Accordingly, I find that Mr. Lee adopted a tagline for the Valentine's Day promotion that he knew or ought reasonably to have known could reasonably be interpreted as inviting customers to kiss staff and that he reasonably ought to have known that this would make the applicant uncomfortable as a female staff member. I also find that some customers did try to kiss or hug the applicant across the counter, and that this was uncomfortable and upsetting to her. I further find that when this concern and discomfort was raised by the applicant with him, Mr. Lee disbelieved the applicant which caused her further upset. I find that Mr. Lee only agreed to a change in wording after being pressed by the applicant and KF.

(4) Allegation re anal sex comment

[51] The applicant states that in September 2009, she accompanied Mr. Lee to a festival in Scarborough. As they were driving back from the festival, the applicant states that Mr. Lee asked her, "do girls really like to take it up the ass?" The applicant states that she replied, "I don't know, I never have and never will". She states that Mr. Lee then slapped her arm and said, "oh come on, I know you've tried it". The applicant states that from then on, she did not give Mr. Lee any room to continue the conversation. She states that she did not say at the time that she felt Mr. Lee's question and comment were inappropriate because she was so disgusted and shocked that he would say something like that to her and because she was a new employee at that time.

[52] KF testified that the applicant spoke to her about this conversation and she believes that this was on the same day. KF recalls the applicant telling her that on the way back from the event, she was asked by Mr. Lee if she enjoyed anal sex and she said no. KF says that she was told that Mr. Lee pushed the conversation and said, "why not, have you ever tried it?" KF recalls the applicant saying that she felt really uncomfortable with the conversation, and felt trapped and that there was nothing she

could do – that she was in a moving vehicle with Mr. Lee and felt that all she could do was answer his questions as vaguely as possible and get to the restaurant as soon as possible.

[53] The applicant's boyfriend also testified that the applicant told him about this incident the day after it had occurred. He states that the applicant said Mr. Lee wanted to know if she liked anal sex and he wanted to get an answer out of her. He states that the applicant was really upset because she felt trapped in the car and her employer was asking questions that were not appropriate.

[54] Mr. Lee's evidence is that he recalls small pieces of a discussion with the applicant in September 2009 on the way back from this event. His evidence is that the applicant asked him what his life is like being gay, and he explained to her that it was hard and that he had to prove himself. On a side note, Mr. Lee states that he told the applicant that when he came out as gay, he did not know about gay people having anal sex, to which the applicant responded by saying "eww". Mr. Lee states that he replied by saying that straight people have anal sex too. Mr. Lee denies asking the applicant whether she liked having anal sex, and even in the context as described by him in his evidence, denies asking the applicant if she had had anal sex. Mr. Lee states that there was no further mention of anal sex beyond him saying that straight people have it too.

[55] The applicant's evidence is that Mr. Lee is confusing two separate conversations. She states that there was an occasion where Mr. Lee initiated a discussion about how he had discovered that he was gay, but her evidence is that Mr. Lee did not talk about not knowing that gay people have anal sex. She states that the conversation she has raised in this proceeding was a separate conversation.

[56] The respondent asked me to make an adverse finding about the applicant's credibility, on several bases. First, it was submitted that the applicant first agreed in cross-examination that she had said "eww" in response to Mr. Lee's reference to anal sex, and then shortly thereafter changed her evidence and denied that she said this. In this regard, I note that Mr. Lee's evidence that the applicant said "eww" in response to

his reference to anal sex was raised for the first time at the hearing. When confronted with this evidence on cross-examination, I observed the applicant go through a process of trying to recall whether in fact she had said this. When asked whether she recalled making a face and saying “eww” when Mr. Lee made reference to anal sex, the applicant’s response was “that was probably my response when he asked if I liked it up the ass”. When later asked whether she finds anything particularly revolting about anal sex, the applicant replied that she just did not find it in her preference. In that context, the applicant stated that she does not believe that she did say “eww” when Mr. Lee asked her about anal sex and then stated that she did not remember. In my view, that is a fair response and does not impinge upon the applicant’s credibility, particularly in relation to a piece of evidence that she had heard for the first time and was trying to recollect.

[57] I also was invited to make an adverse finding about the applicant’s credibility on the basis that she gave an incorrect answer when asked whether she had continued to be alone in a car with Mr. Lee after he had made this comment, and on the basis that she in fact continued to ride in a car to events with Mr. Lee rather than finding her own way there. There is no doubt that the applicant initially said on cross-examination that she did not believe that she continued to ride in a car with Mr. Lee after the September 2009 incident, and then it was pointed out to her that in fact she herself had given evidence that she had ridden in a car with Mr. Lee on December 21, 2009. In this regard, I am aware that witnesses often get confused about dates and the order in which certain events occurred, especially when the hearing is held some two and a half years after the events at issue. I also do not take much from the fact that the applicant continued to ride together with Mr. Lee to work events, rather than finding her own way there. She was responsible for assisting Mr. Lee in packing the vehicle with equipment for the events, and in my view it would have been odd for her to have then told Mr. Lee that she would be making her own way to the event.

[58] I was further invited to make an adverse finding of credibility on the basis that the applicant discussed personal matters with Mr. Lee in the workplace, including cosmetic

surgery, her boyfriend's disability and her family background. I was invited to find that, in light of such personal disclosures, the applicant's allegation that she was uncomfortable with Mr. Lee raising anal sex lacks credibility. I do not accept this submission. The fact that a person may feel comfortable discussing some kinds of personal matters does not necessarily lead to a conclusion that they are open to the initiation of explicit sexual discussions.

[59] In all, I am left with two competing versions of the conversation as between Mr. Lee and the applicant. In this regard, in my view, the evidence of KF and the applicant's boyfriend is material. KF's evidence is that she was told about the conversation on the same day. The fact that KF's version of what she says she was told by the applicant differs slightly from the applicant's version in my view enhances its credibility, as this evidence clearly was not rehearsed. But the key elements of the version given by KF in her evidence are essentially the same: that Mr. Lee initiated a question about whether the applicant (or in the applicant's version, girls in general) liked anal sex and that Mr. Lee asked a question (or in the applicant's version made a comment) about whether she had ever tried it. The applicant's version also is supported by the evidence of her boyfriend, who says he was told about the incident the following day.

[60] If the conversation had occurred as alleged by Mr. Lee, it is my view that KF and the applicant's boyfriend who have had very different evidence to give about what they were told by the applicant at the time. I certainly am aware of the possibility that these two witnesses fabricated their evidence prior to the hearing to support the applicant. But in my view, if this had occurred, their evidence would have been tailored much more closely to reflect the applicant's evidence about this conversation, which it was not. Accordingly, in weighing the conflicting evidence before me and on a balance of probabilities, I find that it is more likely than not that the conversation occurred as stated in the applicant's evidence.

[61] I also note KF's evidence that Mr. Lee would initiate sexual conversations with her in the workplace. While this is denied by Mr. Lee, once again I find KF's evidence to be credible for all of the reasons previously stated. While KF testified that she was

“apathetic” to these conversations, I find that this is another piece of evidence that supports my conclusion that it is more likely than not that Mr. Lee initiated the conversation as described by the applicant.

[62] As a result, I find that in or about September 2009 during a car ride back from an event, Mr. Lee asked the applicant whether it was true that girls like anal sex, and that after the applicant demurred in response, Mr. Lee replied, “oh come on, you know you’ve tried it”. I further find that this was a discussion that made the applicant uncomfortable, and that Mr. Lee knew or ought reasonably to have known was unwelcome.

[63] The applicant also alleged that Mr. Lee made passing remarks and asked sexual questions about her and her boyfriend; however, the applicant’s evidence about these alleged remarks and questions was vague and lacking in particulars. The applicant testified that she did not have a specific recollection of any of these remarks or questions, because she says that this happened so often that she could not really talk about one situation over another. Once again, due to the lack of particularity and in fairness to Mr. Lee, I am unable to make any finding in relation to this allegation.

(5) Allegation re post-Halloween text

[64] The applicant states that on Halloween night in 2009 at about 1 a.m., she went into the restaurant to say hello to another staff member and Mr. Lee also was there. There is no dispute that the applicant was dressed up as little red riding hood. The applicant was scheduled to work the following morning, November 1, 2009. She states that her boyfriend accompanied her to work that morning. The policy at the restaurant was for staff to notify Mr. Lee by phone when they had arrived and opened the restaurant. The applicant’s evidence is that she was aware from the previous night’s receipts that Mr. Lee had been at the restaurant quite late, and so she did not want to disturb him by phoning him. Her evidence is that she sent a text message to Mr. Lee advising him that she was there and had opened the restaurant. At the time, the

applicant and her boyfriend shared a cellphone, and the applicant's boyfriend left the restaurant to return home with the cellphone in his possession.

[65] There is no dispute that, not having received a telephone call from the applicant, Mr. Lee called the store three times between 10:29 and 10:32 a.m. to try to reach the applicant. The applicant's evidence is that she was busy serving customers and so did not answer the phone.

[66] The evidence of the applicant's boyfriend is that Mr. Lee sent a few texts to the applicant wondering where she was and saying that she was not at work and that she was lying. He states that he responded to Mr. Lee by identifying himself and telling Mr. Lee that the applicant was at work and that he had just walked her to work. The applicant's boyfriend states that Mr. Lee replied jokingly by text, saying "what are you going to do about her, she is always so bad". The applicant's boyfriend states that Mr. Lee then sent him a text asking him what he was for Halloween, was he a wolf and did he eat her, with a smiling winking face at the end of the text (denoted by the symbol ";)"). The applicant's boyfriend states that the first thing that came to his mind was that this was a sexual comment, and he felt upset and stopped replying to Mr. Lee's text messages.

[67] The applicant states that her boyfriend told her to look at these text messages, which she did after her shift had ended. She states that she first saw texts from Mr. Lee saying that she was lying about being at work and that she should have called him, and then she saw the text where her boyfriend replied and told Mr. Lee that he had the phone. The applicant states that she saw Mr. Lee's text saying, "Katie is so bad, what are we going to do with her?" She states that she then saw the text where Mr. Lee said, "I know Katie was red riding hood, what were you a wolf? did you eat her?" with a winking smiling face. The applicant states that the first thought in her mind was that Mr. Lee's comment was sexual in nature, and that her boyfriend also thought so and that was why he felt it necessary to show her the texts. The applicant does not think she could have misconstrued Mr. Lee's text to be anything else with a winking smiling face right next to it.

[68] The applicant's evidence is that she did not speak to Mr. Lee about this text message, both because it upset and really disturbed her and because when she had confronted Mr. Lee about other things, he would make a joke and think it was funny.

[69] KF testified that she also saw the text, which she believes she saw the next day or the day after. Her evidence is that the text message said, "oh I hear she was little red riding hood, were you the big bad wolf, did you eat her?" She states that she believes there was a winking face. KF's evidence is that she understood the meaning of the comment to be "geared towards cunnilingus" because that was the general nature in which Mr. Lee spoke.

[70] An actual copy of this text message is not in evidence before me. The evidence of the applicant's boyfriend is that he and the applicant got a newer phone shortly after this incident, but continued to keep the older phone. However, about a year ago when they moved into a new apartment, the phone went missing and was lost.

[71] Mr. Lee states that he has a vague recollection of the applicant dropping by the restaurant on Halloween night. His evidence is that he recalls asking the applicant what she was going to dress up as, and she said that she was going to be little red riding hood and her boyfriend was going to be the big bad wolf. The applicant's evidence is that her boyfriend was dressed up as a prison convict.

[72] Mr. Lee confirmed that the restaurant was open until 4 a.m. on Halloween night, but states that he was working by himself and does not know how the applicant would know how late he had worked.

[73] Mr. Lee states that he believes he received a text message from the applicant that the restaurant was open. He states that he texted back and said that she was supposed to call him. Mr. Lee does not know if the applicant responded back. Mr. Lee states that at this time, he did not think the restaurant was open and that this was his fear, because there was no phone call. Mr. Lee states that he called the store three

times and nobody answered. Mr. Lee states that it was not a busy time, and the applicant had ample opportunity to pick up the phone or at least call him.

[74] Mr. Lee confirms that the applicant's boyfriend responded to his text message and said that the applicant was at the store. Mr. Lee's evidence is that when he found that out, he felt at ease. He states that he started texting with the applicant's boyfriend, asking whether he had found a job.

[75] In my questioning, I asked Mr. Lee whether he disputed the evidence I had heard about what his text message said. In response, Mr. Lee testified that he believes he said, "where is she? did you eat her?" He also testified that he cannot confirm whether he ended his text with a smiley face (":)") or a wink (";)") because to him both symbols mean that he is joking. Mr. Lee did not otherwise dispute the content of the text message.

[76] When asked why he had asked "did you eat her?", Mr. Lee testified that he meant "where was she?", because she was missing in his mind as he had called the restaurant and she had not answered the phone. Mr. Lee testified that the purpose of his text message was to portray a joke that the applicant's boyfriend was the big bad wolf and she was little red riding hood and he had eaten her and that was why she was missing. Mr. Lee testified that he does not understand how this can be taken as a sexual comment, because it is a fairy tale story taught to children at school. He states that his intention was to say, "did you eat her? she's gone". His evidence is that with the sexual meaning of "eat her", the applicant would not disappear. The problem I have with this evidence is that, by the time he sent this text message, Mr. Lee already knew the applicant's whereabouts and that she had not disappeared, because he had already been told by the applicant's boyfriend that she was at the restaurant and his evidence is that he was reassured by this information.

[77] I also note that in Mr. Lee's Response to the Application, when he addressed this text message, he did not say that his text message expressly included either the question "where is she?" or "where was she?" I asked Mr. Lee whether he could

explain that omission. In response, Mr. Lee stated that he was not a lawyer and was just writing down what he thought and did not think about the specific content of the text he had sent.

[78] I am troubled by this evidence. If Mr. Lee's text message had included the question "where is she?" or "where was she?", there would in my view be little room to interpret the text message in a sexual manner. Yet I have the applicant's evidence, as supported by her boyfriend and KF who also saw the text message, that these questions were not part of the text message at issue in this proceeding, and that all three of them interpreted the text message as having a sexual connotation.

[79] Accordingly, I accept the applicant's evidence that Mr. Lee's text message to her boyfriend said, "Katie was little red riding hood, were you a wolf, did you eat her?" with a winking smiley face at the end. I find that this message was sent at a time when Mr. Lee already was aware of the applicant's whereabouts and had been reassured by this information, so I reject his explanation that his "joke" was intended to be about the applicant having disappeared.

[80] Respondent's counsel submitted that it was mere speculation on the applicant's part that Mr. Lee's text message conveyed a sexual connotation, and that it would be speculative for the Tribunal to make such a finding. I reject this submission. I honestly am at a loss as to what other meaning could be attributed to this message, particularly given that at the time it was sent, there was no issue that the applicant had "disappeared". In my view, and I find, the text message was sent as a joke or double entendre by Mr. Lee to use the context of the little red riding hood fairy tale where the big bad wolf literally eats the young girl to convey a double meaning to suggest the sexual act of cunnilingus. In my view, this is not speculation on my part, but rather an interpretation of the words that I have found were used by Mr. Lee in his text message. I find that Mr. Lee reasonably ought to have known that his text message would be shared with the applicant by her boyfriend and that it would be unwelcome to her.

[81] Respondent counsel raised an issue in this context that he viewed an impinging

negatively on the applicant's credibility, namely that in her original Application she alleged that she "forgot" to call Mr. Lee whereas in her Reply and in her evidence at the hearing she stated that she had deliberately decided not to call him because he had been working late and she did not want to disturb him. I appreciate that there is an inconsistency in these two versions, but I am not satisfied as to the seriousness of this inconsistency in relation to the material issue before me. Whether the applicant forgot to call Mr. Lee or whether she deliberately chose not to call him does not change the fact that Mr. Lee sent the text message at issue in this proceeding, that the content of the text message as alleged by the applicant is supported by two other witnesses who saw the text and is largely undisputed by Mr. Lee, and that Mr. Lee's evidence that he included the words "where is she?" or "where was she?" in the text does not make sense in the surrounding context.

(6) Allegations re hugging and hiring "good looking" employees

[82] The applicant's evidence is that on occasion, Mr. Lee would come up and hug her. She states that she would never reciprocate. The applicant states that on one occasion, Mr. Lee came in and was stressed and upset and wrapped his arms around her and put his whole body weight into the hug. The applicant states that she knew that Mr. Lee is a gay man, and so she never took this as a sexual act. However, she states that she regarded it as an invasion of her personal space and that it was unwelcome to her.

[83] The applicant's evidence is that on one occasion, she said that she did not like to be hugged and that she did not like people in her personal space, unless this was with family and friends. She believes that Mr. Lee did try to hug her a few times afterwards. Her evidence is that when she said that she did not like to be hugged, she said this in general way and not in relation to Mr. Lee's hugs specifically and she was hoping that he would get the point. However, she does not think that Mr. Lee believed that this general comment applied to him.

[84] KF testified that Mr. Lee did hug her in the workplace on a couple of occasions.

She did not regard the hugs as being sexual in nature, and stated that it just seemed like he really needed a hug.

[85] Mr. Lee's evidence is that he hugs all of his staff whenever they do a good job or just as a greeting. He believes that a hug is a good thing and that everybody needs hugging. He states that there is no hidden agenda because the applicant knows he is gay.

[86] Mr. Lee states that the applicant never told him not to hug her or that she was concerned about having her private space invaded. He states that he would respect someone if they told him that they do not like somebody touching them. He states that he had no idea that the applicant did not like to be touched or hugged or have her private space invaded, and states that he saw her hugging KF and other staff members.

[87] I appreciate that hugging in a general sense is a good thing, but one needs to be careful when engaging in such activity in the workplace. The issue for me under the *Code* is whether, in the specific circumstances of this case, Mr. Lee's hugging of the applicant can be regarded as sexually discriminatory. I do not see any basis in the evidence to support this, particularly as the applicant has confirmed that she did not regard this as a sexual act. Rather, it seems that this is a matter of the applicant's personal private space and boundaries, which are not matters addressed under the *Code* in the absence of some link or connection to a prohibited ground of discrimination. Accordingly, I make no finding in relation to this allegation.

[88] The applicant also raised one further allegation in the Application, namely that Mr. Lee had a preference for hiring "good looking" staff. On the basis of the applicant's own evidence, this alleged preference extended to both men and women. A preference based on personal appearance, again absent any connection or link to a ground of discrimination prohibited under the *Code*, is not an allegation that is within this Tribunal's jurisdiction. I also note the applicant's evidence before me that this allegation did not impact her personally in the way the other allegations did, and that she just did

not think it was right. For these reasons, I also make no finding in relation to this allegation.

ANALYSIS AND REMEDY

[89] For the foregoing reasons and in consideration of all of the evidence, my assessment of credibility and on a balance of probabilities, I have made the following findings:

- a. I found that, at some point early in the applicant's employment with the respondent business, Mr. Lee made a comment in reference to at least one former Black employee being on "Jamaican time" that he knew or ought reasonably have known to be racially discriminatory. I further found that the use of this expression was offensive and upsetting to the applicant, both on a personal level and due to her connection with her step-father. And I found that Mr. Lee did not respond appropriately when the applicant's concern about this comment was raised with him in January 2010.
- b. I found that Mr. Lee adopted a tagline for the Valentine's Day promotion in early February 2010 that he knew or ought reasonably to have known could reasonably be interpreted as inviting customers to kiss staff and that he reasonably ought to have known that this would make the applicant uncomfortable as a female staff member. I also found that some customers did try to kiss or hug the applicant across the counter, and that this was uncomfortable and upsetting to her. I further found that when this concern and discomfort was raised by the applicant with him, Mr. Lee disbelieved the applicant which caused her further upset. I found that Mr. Lee only agreed to a change in wording after being pressed by the applicant and KF.
- c. I found that in or about September 2009 during a car ride back from an event, Mr. Lee asked the applicant whether it was true that girls like anal sex, and that after the applicant demurred in response, Mr. Lee replied, "oh come on, you know you've tried it". I further found that this was a discussion that made the applicant uncomfortable, and that Mr. Lee knew or ought reasonably to have known was unwelcome.
- d. I found that on November 1, 2009, Mr. Lee sent a text message to the applicant's boyfriend that said, "Katie was little red riding hood, were you a wolf, did you eat her?" with a winking smiley face at the end. I found that the text message was sent as a joke or double entendre by Mr. Lee to use the context of the little red riding hood fairy tale where the big bad wolf literally eats the young girl to convey a double

meaning to suggest the sexual act of cunnilingus. I found that Mr. Lee reasonably ought to have known that his text message would be shared with the applicant by her boyfriend and that it would be unwelcome to her.

[90] The applicant alleges that she experienced a poisoned work environment as a result of these comments and actions by Mr. Lee, contrary to s. 5(1) of the *Code*. In my view, in considering whether comments or conduct has created a poisoned work environment, it is not the proper approach to parcel out the comments or conduct by each different ground of discrimination. Section 5(1) of the *Code* provides protection against discrimination in employment on all of the grounds listed, and in my view the proper approach is to consider the offending comments or conduct as a whole irrespective of the individual grounds of discrimination that each separate incident may involve.

[91] In considering all of the findings I have made as listed above in their totality, I find that Mr. Lee's comments and conduct did create a poisoned work environment for the applicant in violation of s. 5(1) of the *Code*. In making this finding, I have considered the following factors: that the comments and conduct that form the basis of this finding occurred over the course of the entire period of the applicant's employment with the respondent business; that the applicant was upset and discomfited by Mr. Lee's comments and conduct, and at least in respect of two of the incidents at issue expressed her discomfort and upset to Mr. Lee; that Mr. Lee was the applicant's boss and owner of the respondent business; and that Mr. Lee failed to respond appropriately when concerns were raised with him by the applicant. These factors, when combined with the nature and seriousness of the comments and actions themselves, in my view combined to make it effectively a term or condition of the applicant's employment with the respondent business that she be subjected to and required to endure comments and actions by Mr. Lee that were discriminatory in nature on the grounds of sex, race and colour.

[92] In argument and at my invitation, respondent counsel addressed this Tribunal's

decision in *Lee v. T.J. Applebee's Food Conglomeration*, (1987) 9 C.H.R.R. D/4781, which stands for the proposition that an applicant can be subjected to a racially poisoned work environment even if some of the comments were directed at staff members of a different race than the applicant. I appreciate and accept counsel's submissions that the *Lee* decision is from a different era when racial comments were much more explicit and that the conduct in that case was of a significantly more severe nature than the conduct at issue here. That, however, does not mean that in order to support an allegation of a poisoned work environment, conduct must reach the significant and extreme level displayed by the facts in the *Lee* decision.

[93] Rather, in determining whether or not a respondent's comments or conduct have created a poisoned work environment, this Tribunal needs to consider whether, based upon the totality of the evidence and context, the conduct at issue ultimately becomes effectively a term or condition of the applicant's employment. For the reasons stated above, I have found that Mr. Lee's conduct and actions did create a poisoned work environment for the applicant by becoming an effective term and condition of her employment. In my view, any difference in the degree of seriousness of a respondent's conduct that creates a poisoned work environment is a matter to be considered in relation to the remedy awarded, and not in relation to a finding of liability under the *Code*.

[94] In terms of remedy, the applicant seeks compensation for lost wages. The fact that the applicant ultimately quit her employment with the respondent's business rather than being terminated is not a barrier to this claim: see *Lee v. T.J. Applebee's Food Conglomeration, supra*. However, in order to sustain such a claim, I have to find not only that the respondent's conduct in creating the poisoned work environment was a factor in the applicant's decision to quit her employment, but further that the applicant more likely than not would have remained in her employment for at least some period of time but for the conduct that created the poisoned work environment.

[95] This latter point, in my view, is not supported by the evidence. The evidence

indicates that the final issue that caused the applicant to quit her employment was an allegation raised by Mr. Lee that she had lost money for the business by selling food to a customer whose debit card had been declined. The applicant's evidence is that, while the customer's card was declined, the customer nonetheless paid for her food in cash and the till was balanced at the end of her shift. This was not accepted by Mr. Lee, who attempted to contact the applicant to discuss the issue when she was not at work. The applicant's frustration with Mr. Lee's attempt to contact her and her upset at being accused of failing to balance her till were the immediate reasons for her decision to quit her employment. None of this was raised as an allegation of conduct by the respondent in violation of the *Code*.

[96] Further, I find based on the evidence before me that there were a litany of other non-*Code* related issues that contributed to the applicant's decision to quit her employment. There was an issue about the fact that Mr. Lee withheld from the applicant and other staff tips that were left by customers on credit or debit card transactions, and only allowed staff to retain cash tips. There were issues about Mr. Lee being critical of the applicant's work and being very demanding in his expectations of the applicant and other staff.

[97] While I accept that Mr. Lee's comments and conduct that created a poisoned work environment for the applicant played some role in the applicant's decision to quit, I find that she would have quit her employment in any event due to the other non-*Code* related issues and particularly that she would have quit her employment at the time that she did when she was accused of being short in the till. As a result, I decline to award the applicant compensation for lost wages.

[98] The applicant has claimed compensation for injury to dignity, feelings and self-respect in the amount of \$10,000. I have considered the factors outlined in *Sanford v. Koop*, 2005 HRTO 53, including the applicant's young age and vulnerability, the objective seriousness of the conduct at issue, and the impact of the respondent's conduct on her. While I appreciate that monetary compensation for intangible loss

under the *Code* should not be so low as to trivialize the social importance of the *Code* and effectively create a “licence fee” to discriminate, I also am of the view that the objective seriousness of the conduct at issue and the emotional impact on the applicant does not justify an award of \$10,000. In my view, an award of compensation in the amount of \$3,000 is more appropriate in the circumstances.

[99] I also need to consider whether it is appropriate to make any public interest orders under s. 45.2(1)(c) of the *Code*, which authorizes this Tribunal to order a party to do anything that it ought to do to promote compliance with the *Code*. Pursuant to s. 46.3(2), this includes an ability to make orders as to a respondent’s future practices and allows this Tribunal to make such an order even if none was requested by the applicant.

[100] In this case, I think that the appropriate order is to require Mr. Lee, as the owner of the respondent business, to take the on-line training course called “Human Rights 101” and which is offered by the Ontario Human Rights Commission (the “Commission”) on its website, and to require him to do so within 30 days of the date of this Decision.

[101] I further require the respondent business to develop a human rights policy and to make its current and former employees aware of this policy. This policy is to be developed in accordance with the Commission’s “Guidelines on developing human rights policies and procedures”, which is available on the Commission’s website. This policy is to be developed and implemented within 90 days of the date of this Decision.

ORDER

[102] For all of the foregoing reasons, I hereby make the following order:

- a. The respondent shall pay to the applicant the sum of \$3,000.00 without deduction as compensation for injury to dignity, feelings and self-respect, with post-judgment interest at a rate of 3.0% per annum to run on any amount unpaid more than 30 days from the date of this Decision;

- b. Mr. Lee, as the owner of the respondent business, shall take the on-line training course called “Human Rights 101” offered by the Ontario Human Rights Commission (the “Commission”) on its website, and shall do so within 30 days of the date of this Decision; and
- c. Within 90 days of the date of this Decision, the respondent shall develop and implement a human rights policy in accordance with the Commission’s “Guidelines on developing human rights policies and procedures”, and shall make its current and former employees aware of this policy.

Dated at Toronto, this 12th day of October, 2012.

“Signed by”

Mark Hart
Vice-chair